No. 86-651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED PAPERWORKERS INTERNATIONAL UNION,
Petitioner,

V.

MISCO, INC.,
Respondent.

On Writ of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF *AMICI CURIAE* NORTHWEST AIRLINES, INC., THE AIR TRANSPORT ASSOCIATION OF AMERICA, AND THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. Neither This Court Nor The Lower Federal Courts Have Limited The "Public-Policy" Exception To Violations Of Positive Law	5
A. Evolution of the "Public-Policy" Exception	5
B. Application of the "Public-Policy" Exception in Labor Relations	9
C. Careful Judicial Application of Flexible "Public-Policy" Exception	10
II. The Standard Urged By Petitioner Would Gut *W. R. Grace,* Is Not Necessary To Protect National Labor Policy, And Would Lead To Dangerous Results	16
A. Flexible "Public-Policy" Exception Consistent with National Labor Policy	16
B. Threat to Public Interest and Public Safety from More Rigid Test	20
CONCLUSION	23

TABLE OF AUTHORITIES

	Page
CASES:	
Amalgamated Meat Cutters v. Great Western Food Co., 712 F.2d 122 (5th Cir. 1983)	11,12
American Postal Workers Union v. United States Postal Service, 789 F.2d 1 (D.C. Cir. 1986)	14,21
Bevles Co. v. Teamsters Local 986, 791 F.2d 1391 (9th Cir. 1986), *petition for cert. pending*, No. 86-431	13
Borsari v. FAA, 699 F.2d 106 (2d Cir.), *cert. denied*, 464 U.S. 833 (1983)	21
Burt v. Union Central Life Ins. Co., 187 U.S. 362 (1902)	6
Chicago, St. L. & N.O.R.R. v. Pullman Southern Car Co., 139 U.S. 79 (1891)	7,21
Crocker v. United States, 240 U.S. 74 (1916)	6
E. I. DuPont de Nemours and Co. v. Grasselli Employees Independent Ass'n, 790 F.2d 611 (7th Cir.), *cert. denied*, 107 S. Ct. 186 (1986)	13
Hazelton v. Sheckels, 202 U.S. 71 (1906)	6
Hurd v. Hodge, 334 U.S. 24 (1948)	8,20
Marshall v. Baltimore & O.R.R., 57 U.S. (16 How.) 314 (1853)	6
McMullen v. Hoffman, 174 U.S. 639 (1899)	7,17
Muschany v. United States, 324 U.S. 49 (1945)	8
National Rural Letter Carriers' Ass'n v. United States Postal Service, 625 F. Supp. 1527 (D.D.C. 1986)	13

	Page
Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 633 F. Supp. 779 (D.D.C. 1985)...	22
Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 808 F.2d 76 (D.C. Cir. 1987), *petition for cert. pending*, No. 86-1548.....	3,15,22
Pope Mfg. Co. v. Gormully, 144 U.S. 224 (1892).....	6
Premium Building Products Co. v. United Steelworkers, 616 F. Supp. 512 (N.D. Ohio), *aff'd without opinion*, 798 F.2d 1415 (6th Cir. 1985)	14
Providence Tool Co. v. Norris, 69 U.S. (2 Wall.) 45 (1865).....	6
S. D. Warren Co. v. United Paperworkers Int'l Union, 815 F.2d 178 (1st Cir. 1987).....	12
Schmidt v. Republic Airlines, Inc., 630 F. Supp. 1303 (D. Minn. 1986)	14
Service Employees Int'l Union v. Children's Hospital National Medical Center, 640 F. Supp. 272 (D.D.C. 1984).....	14
Sprott v. United States, 87 U.S. (20 Wall.) 459 (1874).....	6
Steele v. Drummond, 275 U.S. 199 (1927)..	7
Super Tire Engineering Co. v. Teamsters Local Union No. 676, 721 F.2d 121 (3d Cir. 1983), *cert. denied*, 469 U.S. 817 (1984).....	12
Sure-Tan, Inc. v. NLRB, 467 U.S. 883 (1984).....	22
Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353 (1931)	9,17
United Mineworkers of America Health & Retirement Funds v. Robinson, 455 U.S. 562 (1982).....	17

	Page
United States Postal Service v. American Postal Workers Union, 736 F.2d 822 (1st Cir. 1984)	11,12,22
United States Postal Service v. National Association of Letter Carriers, 810 F.2d 1239 (D.C. Cir. 1987) (*per curiam*)	15,21,22
United States Postal Service v. National Ass'n of Letter Carriers, ___ U.S. ___ (May 21, 1987) (No. A-820) (Rehnquist, C.J., in chambers)	15
United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960)	18
Vidal v. Girard's Executors, 43 U.S. (2 How.) 127 (1844)	7,8
W. R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers, 461 U.S. 757 (1983)	*passim*
World Airways v. International Bhd. of Teamsters, 578 F.2d 800 (9th Cir. 1978).	21
Wyman-Gordon Co. v. United Steelworkers, 613 F. Supp. 626 (N.D. Ill. 1985)	14
STATUTES:	
Railway Labor Act,	
45 U.S.C. §§ 151 *et seq.*, 181 *et seq.*	2
45 U.S.C. § 184	2

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INTEREST OF AMICI CURIAE

Northwest Airlines, Inc., is a United States air carrier.[1] As an air carrier, Northwest is subject to the provisions of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, 181 *et seq.* That Act requires air carriers to submit to arbitration any disputes "growing out of grievances, or out of the interpretation or application of [collectively bargained] agreements . . . ." 45 U.S.C. § 184. The Air Transport Association of America ("the ATA") is a Washington-based trade and service association of twenty-two United States airlines and two Canadian airlines. The Airline Industrial Relations Conference ("the Air Conference") is an independent, voluntary association of twenty-one United States scheduled air carriers.[2] The Air Conference was formed to facilitate the exchange of ideas and information concerning personnel and labor relations issues in the airline industry, and to represent the member carriers with respect to related legislative, judicial and administrative matters.

This case presents the issue of the proper scope and application of the so-called "public policy exception" articulated by this Court in *W. R. Grace & Co. v. Local 759, Int'l Union of Rubber Workers,* 461

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[1] Pursuant to Supreme Court Rule 28.1, Northwest Airlines, Inc., states that Northwest Airlines, Inc., is a wholly-owned subsidiary of NWA, Inc., which is a publicly-held company. Northwest Airlines, Inc., has no subsidiaries that are not wholly-owned. One wholly-owned subsidiary of Northwest Airlines, Inc., Compass 315 Limited, holds twenty-five percent of the shares of Gatwick Handling Limited.

[2] A list of members of the ATA and the Air Conference is included in the Appendix.

U.S. 757 (1983), to judicial deference to labor arbitration awards. Northwest and the air carrier members of the other *amici* have a vital interest in the outcome of this case. As air carriers, they are members of a limited category of employers, the essence of whose business is providing a *safe* service to the public—public transportation.

Northwest has filed a petition for a writ of certiorari seeking review of *Northwest Airlines, Inc. v. Air Line Pilots Ass'n,* 808 F.2d 76 (D.C. Cir. 1987), *petition for cert. pending,* No. 86-1548. In that case the court of appeals held that "public policy" did not permit or require a court to decline to enforce an arbitral award ordering Northwest to reinstate a pilot who, while intoxicated, acted as copilot on a Northwest passenger flight. The ATA and the Air Conference have filed an *amicus* brief in support of Northwest's petition in that case.

Amici here present the position that, at least for these employers involved in public transportation, the public interest in safety demands that federal courts have appropriate authority to refuse to enforce labor arbitration awards that direct reinstatement of employees whose on-the-job misconduct has jeopardized the safety of the public, even if there exists no express statutory prohibition on the re-employment of such employees. *Amici* submit this brief to provide the Court with the perspective on this important labor law issue of employers whose business is the safe transportation of the public and, therefore, whose employee discipline and discharge decisions are often based upon public safety considerations.

SUMMARY OF ARGUMENT

For well over a hundred years, this Court has recognized the principle that federal courts should not lend their coercive powers to the enforcement of public or private contracts that are contrary to public policy. This Court held in *W. R. Grace* that the public policy doctrine applies equally to collective bargaining agreements and, therefore, to the enforcement of arbitration awards rendered pursuant to those contracts.

Courts deny enforcement to contracts on this basis only where the public policy is clearly defined and ascertainable by reference to existing law. In applying the doctrine, courts require that the established facts demonstrate that the enforcement of the contract will tend to injure the public or harm the public interest. This method of analysis assures that the public policy rule will not be converted into a license for courts to overturn otherwise lawful contracts arbitrarily. This Court, however has *never* required that a contract or arbitral award compel the violation of positive law before it can be found to contravene public policy.

The existing public-policy rule provides ample safeguards to assure that national labor policy is not compromised by its application. Cases decided by the lower federal courts demonstrate that the rule is applied only reluctantly and only in circumstances where enforcing an arbitral award would adversely affect the public interest, and particularly public safety.

The modified public-policy standard that the petitioner urges this Court to adopt—that a contract must do more than contravene cognizable public pol-

icy; it must violate positive law before a court may refuse to enforce it—would force courts to act against federal public policies and render courts helpless to protect the public interest. There is no basis in the cases, in logic or in national labor policy that supports such a result.

ARGUMENT

I. NEITHER THIS COURT NOR THE LOWER FEDERAL COURTS HAVE LIMITED THE "PUBLIC-POLICY" EXCEPTION TO VIOLATIONS OF POSITIVE LAW.

The petitioner union asserts that an arbitration award rendered pursuant to a collective bargaining agreement must always be enforced unless the award compels the violation of "positive law." In essence, the union is asking this Court to narrow the scope of the "public policy" exception as the Court articulated it in *W. R. Grace* so that the doctrine virtually ceases to exist, at least when applied to collective bargaining agreements. In support of its argument, the union claims that the already narrow public-policy exception is careening out of control toward the destruction of almost every aspect of national labor relations policy. The union's alarm-filled cries ring hollow, however, when viewed in the context of the historical application of the public policy exception to federal court enforcement of private contracts and labor arbitration awards, both before and since this Court's decision in *W. R. Grace*.

A. Evolution of the "Public-Policy" Exception.

As early as 1874, this Court recognized that

> "The proposition that there is in many cases a public policy which forbids courts of justice

> to allow any validity to contracts because of their tendency to affect injuriously the highest public interests . . . is too well settled to admit of dispute." *Sprott v. United States,* 87 U.S. (20 Wall.) 459 (1874).

For well over a hundred years, the Court has refused to lend its enforcement power to contracts where (1) there was a dominant public policy (2) that was "violated" by the contract in question.[3]

In *Crocker v. United States,* 240 U.S. 74 (1916), for example, the Court refused enforcement of a contract between the government and a supplier because of a second, related contingent fee contract between the supplier and a government employee that resulted in the government unknowingly paying an excessive price for goods. Although the contract in *Crocker* did not violate the express terms of any federal statute, such contracts, the Court held, "are deemed inconsistent with sound morals and public policy, and therefore invalid" because of their "baneful tendency." *Id.* at 80. *See also, e.g., Marshall v. Baltimore & O.R.R.,* 57 U.S. (16 How.) 314, 334-335 (1853); *Providence Tool Co. v. Norris,* 69 U.S. (2 Wall.) 45 (1865); *Pope Mfg. Co. v. Gormully,* 144 U.S. 224, 233 (1892); *Burt v. Union Central Life Ins. Co.,* 187 U.S. 362 (1902); *Hazelton v. Sheckels,* 202 U.S. 71 (1906). This Court has long recognized that

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[3] In *Sprott v. United States, supra,* the Court refused to require the federal government to pay Sprott for cotton that Sprott had acquired under a purchase contract with the Confederacy.

"the law will not permit individuals to oblige themselves by contract, when the thing to be done or omitted is injurious to the public." *Chicago, St. L. & N.O.R.R. v. Pullman Southern Car Co.*, 139 U.S. 79, 89 (1891).

This Court also has long recognized that particularly in private industries where the nature of the business is imbued with a public interest—such as the transportation industry—companies are subject to independent duties to act in accordance with the public interest. Contracts of such companies are subject to "a fundamental condition . . . that their provisions must not be injurious to the public." *Chicago, St. L. & N.O.R.R. v. Pullman Southern Car Co., supra,* 139 U.S. at 89-90. Thus, this Court has held that a railroad cannot "make any agreement that militates against the public convenience, or that will defeat the public objects [public convenience and safety] for which it was established." *Id.* at 90.

In adopting this principle, however, this Court recognized that application of the public-policy rule presents a difficult task that could result in federal courts voiding otherwise lawful contracts based on judges' subjective view of "public policy." Since its earliest applications of the public-policy limitation, therefore, the Court has held that it may be invoked only in limited circumstances. *See, e.g., Vidal v. Girard's Executors,* 43 U.S. (2 How.) 127 (1844); *McMullen v. Hoffman,* 174 U.S. 639 (1899); *Steele v. Drummond,* 275 U.S. 199 (1927). As it has evolved, the inquiry involves two steps: first, determining the existence of the asserted public policy, and second,

determining whether that policy is "violated" by the contract at issue. *See, e.g., W. R. Grace, supra,* 461 U.S. at 766.

On the first issue, the Court has stated that "[p]ublic policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Muschany v. United States,* 324 U.S. 49, 66 (1945). *See also, e.g., Vidal v. Girard's Executors, supra,* 43 U.S. (2 How.) at 197-98. The Court has *never* held, however, that the public policy must be found in an express statutory or judicial *prohibition* of the action required by the contract. Indeed, such a miserly requirement would virtually extinguish the public-policy rule and mandate that federal courts lend their enforcement powers to dangerous and unconscionable—but not expressly prohibited—agreements.

Instead of requiring an express statutory statement of a rule or prohibition, this Court has required only that "there must be found definite *indications in the law* of the sovereignty . . . ." *Muschany v. United States, supra,* 324 U.S. at 66 (emphasis added). Thus, in *Hurd v. Hodge,* 334 U.S. 24 (1948), for example, the Court held on public-policy grounds that a federal court could not enforce racially restrictive covenants between private parties, even though the contracts were not themselves unlawful and did not compel unlawful action. The Court found that the public policy of the United States, as gleaned from the Constitution, the Civil Rights Act, and prior decisions, prohibited federal courts from lending their coercive power to such offensive covenants.

Second, this Court has carefully outlined the kind of analysis courts must employ to determine whether a contract actually contravenes public policy. In *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353 (1931), for example, in which a company sought to void, as contrary to Arkansas public policy against monopolies, a contract with a public utility company, this Court considered (1) whether the contract "infringe[d] any statute or regulation made under the authority of the State," *id.* at 357, (2) whether the contract was "arbitrarily or unfairly imposed" upon the company seeking nonenforcement, *id.* at 358, (3) whether performance of the contract would "interfere with the proper discharge of any of [the utility's] duties as a public utility," *id.*, and (4) whether the contract "subjected the . . . company to, or tend[ed] in any manner to impose upon the public, any wrong, disadvantage or evil" that the relevant public policy was intended to avoid, *id.* Following this scrupulous analysis, the Court concluded that the contract did not contravene public policy.

B. Application of the "Public-Policy" Exception in Labor Relations.

This Court has applied the public-policy doctrine equally to labor contracts. "As with any contract . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy." *W. R. Grace, supra,* 461 U.S. at 766. Sensitive, as always, to the dangers of excessive judicial intervention in the collective bargaining process, the Court in *W. R. Grace* emphasized the need for careful judicial consideration of the same factors that must be considered with respect to other kinds of contracts.

Thus, in *W. R. Grace,* the Court considered five factors before concluding that the public policy was not undermined by the labor arbitration award at issue: (1) whether the award would require one of the parties to violate an explicit statutory, regulatory, or judicial command, 461 U.S. at 766-768, (2) whether the conflict between the enforcement of the award and the relevant public policy was the result of voluntary conduct by the party seeking nonenforcement, *id.* at 767, (3) whether the award would create an incentive for one of the parties (or anyone else) to violate the public policy, *id.* at 769-70, (4) whether enforcement of the award would be "so unfair" as itself to violate public policy, *id.* at 770, and (5) whether other important policies would be inappropriately affected by the court's action, *id.* at 771. As with other kinds of contracts, the Court did not limit application of the public-policy rule only to contracts that violate the first prong of the test—direct violation of law.

C. Careful Judicial Application of Flexible "Public-Policy" Exception.

Taking the lead from *W. R. Grace,* the lower federal courts—with the exception of the District of Columbia Circuit—have not limited the public-policy analysis to violations of specific provisions of law. Yet, contrary to petitioner's suggestions, the courts have not run roughshod over collective bargaining agreements. In the four years since this Court decided *W. R. Grace,* for example, in only four cases have courts of appeals held under the existing public-policy rule that arbitral awards should not be enforced. The present case is one of them. In all those cases, the courts of appeals faithfully and carefully applied the *W. R. Grace* analysis.

In *Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983), the court refused enforcement of an arbitral award that ordered a trucking company to reinstate a driver who had admitted, following an accident, that he had been drinking liquor shortly before the accident. The court found that "[a] driver who imbibes the spirits endangers not only his own life, but the health and safety of all other drivers." *Id.* at 124. The public safety considerations, the court found, "become even more compelling when the driver is regularly employed to course the highways in a massive tractor-trailer rig." *Id.* The court determined that there was a "well defined and definite" public policy against drinking and driving embodied in federal case law and Federal Motor Carrier Safety Regulations. *Id.* at 125 *quoting W. R. Grace, supra,* 461 U.S. at 766.

In *United States Postal Service v. American Postal Workers Union,* 736 F.2d 822 (1st Cir. 1984), the court refused to enforce an award reinstating a postal clerk who admitted to embezzling federal postal funds. The court there expressly rejected the argument that public policy could not bar enforcement of an arbitral award unless the award violated positive law. *Id.* at 824. The court found that, as a postal worker, the employee was "imbued with the public trust," and that he had "violated that trust" because his offense "went to the heart of [his] responsibilities." *Id.* at 825. The court found that the public policy that barred court enforcement of the award was embodied in the federal statutes making criminal the embezzlement of postal funds, and in the Postal Service's statutory duty to be prompt, reliable and efficient. *Id.*

More recently, in *S. D. Warren Co. v. United Paperworkers Int'l Union,* 815 F.2d 178 (1st Cir. 1987), on facts very similar to the present case, the court refused to enforce an award reinstating three employees who had been discharged for on-the-job use and sale of illegal drugs. The court concluded that reinstatement would contravene the "well-defined public policy against the use of drugs in the workplace." *Id.* at 186.

In *Amalgamated Meat Cutters,* the First Circuit *Postal Workers* case, and *S. D. Warren,* the courts found that, by the very on-the-job misconduct that had triggered their discharge, the employees had breached duties (1) that they and their employers owed to the public as a matter of law, and (2) that were essential to the employees' position of public trust. By contrast, in cases where the courts of appeals enforced reinstatment awards challenged as violating public policy—again, with the exception of the D.C. Circuit—the employees' misconduct had not breached such work-related duties to the public.[4] The cases

[4] Thus, in *Super Tire Engineering Co. v. Teamsters Local Union No. 676,* 721 F.2d 121 (3d Cir. 1983), *cert. denied,* 469 U.S. 817 (1984), the court ordered enforcement of an arbitral award reinstating an employee with no safety responsibilities who had been discharged for drinking alcoholic beverages during working hours. That court, citing *Amalgamated Meat Cutters, supra,* with approval, held that the employees' "reinstatement conflicts with no law or well-defined policy . . ." and noted that "[t]here was no evidence that [the employee] poses a threat to fellow workers or society." 721 F.2d at 125 n.6.

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decided by the district courts reveal similar results.[5]

The sole exception to the otherwise common and consistent application of the existing public-policy rule under *W. R. Grace* is the District of Columbia Circuit, which has expressly adopted the standard that the union in the present case proposes: the arbitral award must violate positive law before public policy bars its enforcement.

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Similarly, in *E. I. DuPont de Nemours and Co. v. Grasselli Employees Independent Ass'n,* 790 F.2d 611 (7th Cir.), *cert. denied,* 107 S. Ct. 186 (1986), the court enforced an arbitral award ordering reinstatement of an employee discharged after he had suffered a mental breakdown at the company plant and, as a result, had assaulted other employees and destroyed company property. The court, however, expressly rejected the standard urged by the union—that the arbitral award must violate positive law before public policy will bar its enforcement. *Id.* at 616. In *Bevles Co. v. Teamsters Local 986,* 791 F.2d 1391 (9th Cir. 1986), *petition for cert. pending,* No. 86-431, the court enforced an abitral award ordering reinstatement of employees who had been discharged for being illegal aliens. The court held that federal immigration law did not establish a clearly defined public policy that would be undermined by the reinstatement award. In *E. I. DuPont* and *Bevles,* the employees' "misconduct" did not go to the heart of their employment responsibilities and did not involve a breach of a public duty.

[5] *See, e.g., National Rural Letter Carriers' Ass'n v. United States Postal Service,* 625 F. Supp. 1527 (D.D.C. 1986) (court enforced an award reinstating a letter carrier whose discharge stemmed from *off-duty* "misconduct"—his indictment for aggravated criminal sexual abuse of a minor—because no

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In *American Postal Workers Union v. United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986), the court enforced an arbitral award ordering the reinstatement of a postal window clerk who, like the clerk in the First Circuit *Postal Workers* case, had admittedly embezzled postal funds. The court thus transformed the well-established rule that federal courts may not enforce contracts that are "contrary to public policy" into a more crimped rule that "courts will not enforce an arbitration award if the award itself violated established law or seeks to compel some unlawful action." *Id.* at 8. Ignoring all precedent on the public-policy rule, the court asserted that "the

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clearly-defined public policy at issue); *Schmidt v. Republic Airlines*, 630 F. Supp. 1303 (D. Minn. 1986) (maintenance supervisor discharged following indictment for perjury, but not drug-related offense, during grand jury investigation of drug trafficking and for falsifying sick leave records; court found that policy against drug trafficking was not undermined by award); *Wyman-Gordon Co. v. United Steelworkers*, 613 F. Supp. 626 (N.D. Ill. 1985) (employee discharged for collecting unemployment benefits while employed; court found public policy not undermined by arbitral award); *Premium Building Products Co. v. United Steelworkers*, 616 F. Supp. 512 (N.D. Ohio), *aff'd without opinion*, 798 F.2d 1415 (6th Cir. 1985) (employee discharged for on-duty use of marijuana; court found policy against drug use was not undermined by reinstatement award because no safety or judgment concerns involved); *Service Employees Int'l Union v. Children's Hospital National Medical Center*, 640 F. Supp. 272 (D.D.C. 1984) (unit clerk discharged for losing temper and "laying hands" on a patient after patient made disparaging remarks about employee's race; court found no clearly-defined public policy at issue and policy against assault and battery was not undermined by award).

exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards . . . ." *Id. Accord United States Postal Service v. National Ass'n of Letter Carriers,* 810 F.2d 1239 (D.C. Cir. 1987) (*per curiam*) (court enforced arbitral award reinstating letter carrier who diverted and failed to deliver over 3,500 copies of mail, most of it first class, and some of it containing U.S. Treasury checks).[6]

In another case, *Northwest Airlines, Inc. v. Air Line Pilots Ass'n,* 808 F.2d 76 (D.C. Cir. 1987), *petition for cert. pending,* No. 86-1548, the court, following the same principles, enforced an arbitral award ordering reinstatement of an airline pilot who, while intoxicated, had acted as co-pilot of a commercial passenger jet. The anomalous results of those cases—to return to positions of public trust employees whose on-the-job misconduct violated their express duties to act in the public interest or to protect public safety—cannot be squared with the purpose of the public-policy rule nor supported by any component of national labor policy.

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[6] The Solicitor General intends to petition for a writ of certiorari to review the District of Columbia Circuit's decision in that case and to urge rejection of that Circuit's standard. *See United States Postal Service v. National Ass'n of Letter Carriers,* ____ U.S. ____ (May 21, 1987) (No. A-820) (Rehnquist, C.J., in chambers, granting stay of mandate pending the filing and disposition of certiorari petition).

II. THE STANDARD URGED BY PETITIONER WOULD GUT *W. R. GRACE*, IS NOT NECESSARY TO PROTECT NATIONAL LABOR POLICY, AND WOULD LEAD TO DANGEROUS RESULTS.

A. Flexible "Public-Policy" Exception Consistent with National Labor Policy.

The petitioner union argues that national labor policy will be irreparably harmed unless this Court adopts the District of Columbia Circuit's standard limiting the public policy exception to cases where the arbitration award compels the violation of "positive law," presumably a statute or regulation. The union, without saying so, is asking the Court to overrule *W. R. Grace*. To be sure, the Court in *W. R. Grace* considered whether the arbitral award in question violated positive law—an explicit statutory, regulatory, or judicial command. 461 U.S. 766-68. But the Court considered four other factors as well, *see* pp. 9-10, *supra*, factors which the union would have the Court now repudiate.

As we have demonstrated, however, the public-policy rule was *not* designed for application only to labor contracts and is not as narrow as the District of Columbia Circuit apparently would like. The decisions rendered after *W. R. Grace* graphically demonstrate, first, that there has been no stampede to the courthouse by employers seeking to overturn arbitral reinstatement awards and, second, that federal courts have faithfully applied the existing public-policy rule. There is simply no justification for altering a rule of judicial restraint that the courts have consistently

"applied with caution and only in cases plainly within the reasons on which that doctrine rests." *Twin City Pipe Line Co. v. Harding Glass Co., supra,* 283 U.S. at 356-57.

The union looks for support in *United Mineworkers of America Health & Retirement Funds v. Robinson,* 455 U.S. 562 (1982), a case concerning an entirely different issue. The union argues that "nothing in the national labor policy requires a court to enforce a contract which 'violates any command of Congress . . . .'" (Pet. Br. at 16; *quoting Robinson,* 455 U.S. at 576). The union, however, fails to note that the Court's opinion in the *Robinson* case was broader than that. The Court held that "as long as [specific provisions of the labor contract] do not violate federal law *or policy,* they are entitled to the same respect as any other provision in a collective bargaining agreement." *Id.* at 575 (emphasis added). Thus, *Robinson* is consistent with *W. R. Grace*: federal courts may not enforce labor contracts that violate federal positive law *or* federal policy. There is no basis in this Court's opinions for the union's crimped view of the "public-policy" exception.

The union also claims that, unless the doctrine were so limited, the public-policy rule would permit courts "to refuse to enforce *lawful* collective bargaining agreements" (Pet. Br. at 15, emphasis in original), thus undermining federal policy favoring labor contracts. That assertion begs the question. Like other contracts, collective bargaining agreements that are contrary to public policy "are illegal in their nature and tendency . . . ." *McMullen v. Hoffman, supra,* 174 U.S. at 649. The lawfulness or validity of the contract

is the precise question that the courts answer when they apply the public-policy exception.

Moreover, there is nothing behind the union's cries that a court's refusal on public-policy grounds to enforce a collective bargaining agreement results in "a regime in which the employer exercises absolute and unlimited power" and "unfettered discretion." (Pet. Br. at 15). A court may only refuse to enforce an arbitral award when *the court* finds that the "contract as interpreted" by the arbitrator "violates some explicit public policy" and that the policy is "well defined and dominant." *W. R. Grace, supra,* 461 U.S. at 766.

Judicial determination that a dominant public policy exists guarantees not only that national labor policy will be given due deference but also that employers cannot decline to comply with arbitral awards based on their unilateral view that some abstract public policy prevents them from doing so.

The union also argues that, if the judiciary is free "to invoke public policy to refuse to enforce arbitral awards which do not violate positive law," then the policy favoring arbitration would be disserved. (Pet. Br. at 20). It is difficult to understand—and the union does not explain—how the policy favoring labor arbitration is not equally "disserved" by the well-established rule that when the arbitrator's decision manifests an "infidelity" to his duty to render an award that draws its essence from the labor contract, "courts have no choice but to refuse enforcement of the award." *United Steelworkers v. Enterprise Wheel and Car Corp.,* 363 U.S. 593, 597 (1960). That judicial

determination, no less than the public-policy determination, would make it "all too easy for the courts . . . to second-guess arbitrators concerning their factual findings and contract interpretations" (Pet. Br. at 21)—unless the courts exercise restraint in making those determinations. But they do. The opinions of the federal courts that have decided the public-policy issue in the labor contract context demonstrate that the courts do *not* "second-guess" arbitrators or annul their decrees cavalierly.

The union asserts that adoption of the District of Columbia Circuit's standard would best serve national labor policy because it would leave Congress and the states free to regulate the employment relationships—for example, "to proscribe the employment of certain categories of persons or to establish licensing or other prerequisities for certain jobs." (Pet. Br. at 24). Congress and the states are, of course, free to take such action now or at any time. Applying the existing public-policy rule to collective bargaining agreements will not in any way restrict that legislative power.

To the contrary, the union's proposed standard would *require* that legislatures enact express prohibitions against reinstatement of reckless employees to positions of public trust in order to protect the public interest. Under the existing rule, however, a clearly defined and dominant public policy, ascertainable from existing law, already prohibits federal courts from enforcing such reinstatement orders. The existing public-policy rule, as the history of the application of the rule demonstrates, strikes the right balance to protect the rights of employees, the rights of employers, and the rights of the public.

B. Threat to Public Interest and Public Safety from More Rigid Test.

The union's position would lead to anomalous and dangerous results. In the present case, for example, adoption of the union's position would forbid a court the power to prevent a labor arbitrator from forcing an employer to reinstate an employee who has endangered himself and his co-workers. In support of that result, the union argues that the public policy against the use of illegal drugs or other intoxicants by operators of dangerous machinery would not be furthered by the court's refusal to enforce the arbitral reinstatement award, because that irresponsible employee, if discharged, might simply operate dangerous machinery for some other employer. It is far from certain, however, whether another employer would hire that employee for such a position. Moreover, the union misses the point of the public-policy exception. The issue is whether a federal court should use *its* coercive power to require Misco to reinstate an irresponsible employee, who has already shown his disregard for his own physical safety and the safety of others, to a position a trust. It is already well established that, absent an express statutory prohibition, private parties may *agree* to take reprehensible action. *See, e.g., Hurd v. Hodge, supra,* 334 U.S. at 31. Entirely different considerations govern whether a federal court should enforce such agreements. *Id.* at 34.

Apart from the facts of this case, however, the union's suggested approach would force federal courts to act against federal public policy and would render the courts helpless to protect the public interest in the

few situations where an arbitral award seriously jeopardizes the public interest or safety. In the area of public transportation, for example—where an employer has an obligation not to make agreements "that will defeat the public objects for which it was established," *Pullman Southern, supra,* 139 U.S. at 90—employers must act primarily to assure the safety of the travelling public. Yet the District of Columbia Circuit's standard actually allows arbitrators to second-guess the safety decisions and policies that federal law requires common carriers to make. As already applied, this standard led the court to order an airline to put back into the cockpit a pilot who flew while intoxicated, despite the fact that the airline determined, in the exercise of its federal statutory duty to promote the "highest degree of safety" in air transportation, that discharge is the proper penalty for such conduct. *See Northwest Airlines, Inc. v. Air Line Pilots Ass'n, supra; compare World Airways v. International Bhd. of Teamsters,* 578 F.2d 800 (9th Cir. 1978). That standard would require a court to force a nuclear power plant to obey an arbitral award to place back in the control room an employee found using drugs on the job. *But compare Borsari v. FAA,* 699 F.2d 106 (2d Cir.), *cert. denied,* 464 U.S. 833 (1983). It would require a court to defer to an arbitrator's decision to reinstate at a hazardous waste dump site an employee who accepted a bribe to permit illegal dumping. *Compare American Postal Workers Union v. United States Postal Service, supra,* 789 F.2d 1 (D.C. Cir. 1986); *United States Postal Service v. National Ass'n of Letter Carriers, supra,* 810 F.2d 1239 (D.C. Cir. 1987).

These hypotheticals may seem like a "parade of horribles," but they accurately reflect the reality of the *Northwest* case and the implication of the *Postal Service* cases. The fundamental flaw with the District of Columbia Circuit's and the union's view is that it focuses on the interests of employer and employee, and turns a blind eye to the interest of the public. Admittedly, it is an unusual case where the public has a real and substantial interest in the outcome of an individual employee's labor dispute. But there are cases where it does, and as the district court in the *Northwest* case recognized, the public truly may be affected by the result of the arbitration, yet is not represented in the collective bargaining process, and "is not a party . . . has not participated . . . and has not voluntarily consented to abide by the decision reached." *Northwest Airlines, Inc. v. Air Line Pilots Ass'n,* 633 F.Supp. 779, 793 (D.D.C. 1985). In such cases, the long-established rule prohibiting federal courts from enforcing contracts that contravene public policy is the only means by which the courts can protect public safety. The union and the District of Columbia Circuit, however, would deny the courts that power. Contrary to their myopic view, labor relations policies are not always paramount to other important public interests. *See Sure-Tan, Inc. v. NLRB,* 467 U.S. 883 (1984).

Far better is the approach of the First, Fifth, Seventh and Ninth Circuits—and the district court in *Northwest*—which, true to *W. R. Grace* and its antecedents, allows courts to consider factors beyond whether an award directly violates positive law. Those courts soundly decline to enforce an arbitral award reinstat-

ing an employee in a position of public trust if his on-the-job misconduct violated a statute or regulation that was specifically designed to protect the public interest or public safety. Under this view, a federal court, for example, must refuse to enforce a labor arbitrator's decision to order a public transportation employer to place the safety of its passengers in the hands of an on-the-job substance abuser. Under the District of Columbia Circuit's view, however, the court must lend its imprimatur to that unconscionable result.

CONCLUSION

This Court should reaffirm the validity of the existing public-policy rule and affirm the judgment of the court of appeals.

Respectfully submitted.

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June 1987.

APPENDIX

ATA MEMBERS

AirCal
Alaska Airlines
Aloha Airlines
American Airlines
Braniff
Continental Airlines
Delta Air Lines
Eastern Air Lines
Evergreen International Airlines
Federal Express
The Flying Tiger Line
Hawaiian Airlines
Midway Airlines
Northwest Airlines
Pan American World Airways
Piedmont Airlines
PSA-Pacific Southwest Airlines
TranStar Airlines
Trans World Airlines
United Airlines
United Parcel Service
USAir

Associate Members

Air Canada
Canadian Pacific Air Lines

AIR CONFERENCE MEMBERS

Airborne Express
AirCal
Alaska Airlines
Aloha Airlines
America West Airlines
American Airlines
Braniff Airways
Continental Airlines
Eastern Airlines
The Flying Tiger Line
Midway Airlines
Northwest Airlines
Pacific Southwest Airlines
Pan American World Airways
Piedmont Airlines
Reeve Aleutian Airways
Tower Air
Trans World Airlines
United Airlines
USAir
World Airways